UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v.

MARIA HSIA,

Defendant.

Civil Action No. 98-57 (PLF/JMF)

REPORT AND RECOMMENDATION

This matter has been referred to me by Judge Friedman for resolution of the Kastigar issue that have arisen in the case. The Defendant, Maria Hsia, complains that her Fifth Amendment rights have been violated by being called before a Grand Jury, compelled to give testimony under a grant of immunity, and subjected to the improper use of that immunized testimony by prosecutors at her sentencing. On January 10 and 11, 2001, I conducted a Kastigar hearing on this matter to determine whether or not Hsia's Fifth Amendment rights had in fact been violated. Below follows my Findings of Fact and Analysis explaining my ultimate conclusion that one of the government's arguments at sentencing should be suppressed.

FINDINGS OF FACT

1. On March 3, 2000, the trial in United States v. Hsia concluded in a guilty verdict.

2. The Campaign Financing Task Force attorneys in charge of investigating and prosecuting Hsia

were John McEnany and Eric Yaffe. Robert Conrad, presently the Chief of the Task Force, supervised McEnany and Yaffe through the trial to the present time.

3. Contemporaneous with the investigation of Hsia, the Task Force was investigating certain other campaign contributions. This investigation was being conducted primarily in California by Assistant United States Attorney Daniel O'Brien.

4. Conrad was also in charge of supervising the California Task Force investigation. Conrad testified to supervising both the Task Force's investigation of Hsia and the California campaign finance investigation in a "hands on" fashion.

5. Subsequent to Hsia's trial and conviction, O'Brien determined that Hsia might be able to provide valuable information to his California investigation and decided to seek her cooperation. Through her counsel, however, Hsia declined to cooperate. The Task Force then determined to compel her testimony by seeking an order granting her immunity. The order was secured and Hsia was called before the Grand Jury in California. O'Brien interrogated her before the Grand Jury.

6. At the insistence of Hsia's counsel, Nancy Luque, who complained on behalf of her client about the services of the interpreter who was assisting Hsia in the Grand Jury room, Hsia's first appearance before the Grand Jury was continued.

7. At one point after Hsia's initial grand jury appearance, Conrad and O'Brien discussed Hsia's language difficulties and the need to adjourn her first appearance because of them.

8. Conrad recalled that O'Brien articulated the perception that Hsia was not sincere in her complaints about having difficulties understanding O'Brien's questions. The two men discussed

the remedies available to them because of Hsia's perceived lack of cooperation, which could be deemed a violation of the order granting her immunity and directing her to testify. They ultimately decided not to seek a contempt finding.

9. In seeking Hsia's testimony before the grand jury, O'Brien had expressed to Conrad O'Brien's concern that Hsia's status as a convicted but yet to be sentenced defendant could potentially raise problems of her grand jury testimony tainting the government's position at sentencing. O'Brien indicated that a cautious approach was appropriate, like a man who wears a belt and suspenders.

10. To that end, O'Brien discussed with Conrad whether an "ethical wall" should be erected. By this, O'Brien meant that there would be one person to whom the lawyers working on the California investigation and the lawyers working on the Hsia sentencing would report. That one person alone would determine whether information secured by one of the teams of the lawyers would be shared with the other team.

11. While no attorney was expressly appointed in that capacity, O'Brien believed on the basis of his conversation with Conrad that Conrad would function in that capacity or, at least, would prevent the information gathered from the California grand jury from being disseminated improperly. Further, O'Brien and Conrad agreed that O'Brien would not speak with the Washington prosecutors, McEnany and Yaffe, about Hsia's Grand Jury testimony.

12. No formal measures were put in place to shield the prosecutors in the Hsia case from Hsia's immunized testimony. McEnany, Yaffe, Conrad and O'Brien indicated that no one ever took any formal steps, by way of memoranda or other formal measures such as initialing and dating

documents, to ensure that Ms. Hsia's immunized testimony was kept separate from the government's sentencing process. The attorneys recalled oral communications in which they warned one another not to discuss the substance of Hsia's testimony. O'Brien recalled reminding Yaffe and McEnany on several occasions that they were not to discuss the substance of Hsia's immunized testimony. However, the attorneys did not recall making any written notation of these or other discussions related to Hsia's immunized testimony.

13. After Hsia's grand jury testimony, both Yaffe and McEnany recalled having phone conversations with O'Brien in which Yaffe and McEnany discussed Hsia's appearance before the Grand Jury. Neither attorney recalled ever discussing the substance of Hsia's testimony with O'Brien. Both attorneys were aware that Hsia had appeared before the Grand Jury and that her testimony was immunized.

14. On April 18, 2000, subsequent to Hsia's Grand Jury appearance, Conrad interviewed Vice President Gore in connection with the Campaign Finance investigations and specifically, the Hsi Lai Temple. Conrad testified that he knew from his prior conversation with O'Brien regarding Hsia's testimony before the Grand Jury that O'Brien felt that Hsia was insincere in her protestations that she did not understand English. During that conversation, Conrad recalled sharing his observation of Hsia in Washington, DC in which Hsia seemed able to understand English.

15. During his interview with Vice President Gore, Conrad specifically spoke with Gore about Hsia's ability to speak English. Conrad confirmed that his very first question posed to Vice President Gore about Ms. Hsia related to Hsia's ability to speak English. Conrad testified that

he asked the Vice President about Hsia's English-speaking abilities as a way to pursue O'Brien's skepticism about Hsia's difficulties during the Grand Jury testimony. Conrad also recalled wanting to inform his own understanding of her English-speaking abilities.

16. After Hsia's conviction, Yaffe resigned and entered into private practice. Sometime in September 2000, Conrad decided that he wanted to have second lawyer work with McEnany in the sentencing phase of the Hsia case. He convinced Yaffe to return to the Task Force as a special Assistant United States Attorney. Conrad recalled wanting Yaffe to return to the case because the Task Force was short-staffed, and Yaffe had the knowledge and skill he believed important to the case.

17. In conversations between Conrad and Yaffe, both in connection with Yaffe's return and subsequent discussions, the two men spoke about what the government's position should be in seeking upward departures in Hsia's sentencing. Yaffe recalled that Conrad was interested in making sure the government took the appropriate position on upward departure. Specifically, according to Yaffe, their conversations concerned whether the United States Sentencing Guidelines ("the Guidelines") properly took into account Hsia's conduct as well as the kind of loss that had occurred.

18. On November 8, 2000, the Task Force transmitted to the United States Probation Office its preliminary Guidelines analysis in the Hsia case. In that document, prepared in its first draft form by McEnany, the Task Force first proffered relevant conduct which was not based on evidence at the trial but which the Task Force proffered as to what it could prove at a sentencing hearing. These acts were based on evidence gathered during the investigation of

Ms. Hsia's activities which would have been offered into evidence at a trial had other charges against Ms. Hsia not been dismissed on the Task Force's motion.

19. The government then discussed application of the Guidelines. In this analysis, the Task Force indicated that because there was no guideline specifically applicable to campaign financing offenses, § 2F1.1 of the Sentencing Guidelines was the governing guideline, and the five counts of conviction and the relevant conduct would be grouped under U.S.S.G. § 3D1.2(d) and U.S.S.G. § 1B1.3(a)(2). Letter of November 8, 2000 at 3-4.

20. The base offense level thus derived under § 2F1.1 was, according to the Task Force, to be increased by one level for a loss of $3,250 in presidential matching funds and then by an additional two levels for "more than minimal planning." Id. at 4.

21. The Task Force then sought an adjustments upward of four levels because the defendant was an "organizer" of a criminal activity that was "otherwise extensive," thereby raising the offense level to 13. Id.

22. The Task Force finally argued that Application Note 11 to § 2F1.1 permitted an upward adjustment in cases in which the loss determination did not fully "capture the harmfulness and seriousness of the conduct." The Task Force argued that this was such a case and that "the upward departure should be based on equivalence of the total amount of illegal conduit payments to the loss table in § 2F1.1." Id. at 5.

23. Since the contributions involved in the counts of conviction and the relevant conduct totaled $139, 5000, the Task Force insisted that there should be a loss equivalent in that amount, which under the table in § 2F1.1 resulted in an upward departure of seven, which lead to a total

offense level of 20. In other words, under the Task Force's analysis, Hsia should be treated as if she had, for example, stolen $139,500.

24. Conrad played a significant role in the articulation of the Task Force's position with respect to upward departure under Application Note 11. According to Conrad, he reviewed the draft of the November 8th letter to probation and discussed with Yaffe and McEnany the arguments being made. Conrad did not recall a specific discussion about the letter, but rather a general conversation about the substance of the information contained in the letter.

25. Conrad testified that he did not add to or make direct changes to the letter. He recalled having a discussion about the amount of upward departure, both before and after the time of the letter. Conrad testified that the argument most logical to him with respect to upward departure was the dollar for dollar analogy to the Fraud tables. He further testified that he viewed the letter as part of an ongoing debate about the proper measure for departure in Hsia's case.

26. According to McEnany, he and Conrad reviewed the letter together and made changes. McEnany recalled drafting the letter, showing it to Conrad, and having a discussion with Conrad that focused primarily on what the appropriate measure for upward departure should be under Application Note 11. McEnany recalled that the changes that he and Conrad made together related to the proper measure of upward departure and the fact that the presidential matching funds issue should be considered separately from upward departure.

27. McEnany further recalled that the issue of separating the matching funds loss from the upward departure argument was Conrad's idea. According to McEnany, the attorneys discussed Application Note 11 at the first meeting with probation, but McEnany attributed to Conrad the

belief that the appropriate measure under Application Note 11 would be dollar for dollar. McEnany testified that this was an area in which Conrad changed McEnany's original position. According to McEnany, this change resulted in an increase of about six offense levels, plus or minus one.

28. The principal area of ongoing discussion between McEnany, Yaffe and Conrad with respect to Hsia's sentencing was the proper measure under Application Note 11. The main point of Conrad's supervision in the Hsia sentencing, according to McEnany, was with respect to Application Note 11. McEnany recalled that Conrad's level of supervision as to everything else in the sentencing was very little.

29. Unlike the discussion of the upward adjustment under Application Note 11, the so-called Kingpin adjustment, or organizer role, was not the subject of much debate. Conrad did not recall whose idea the Kingpin adjustment was. He recalled that it was not a very disputed issue among Yaffe, McEnany and himself. Further, he recalled that the Kingpin argument was most likely part of the November 8th letter that he reviewed with McEnany. McEnany confirmed that the Kingpin adjustment was one of the points from McEnany's letter to probation that was never particularly discussed with Conrad.

30. Conrad testified that he approached his conversations with McEnany and Yaffe with respect to Hsia's sentencing in a consensus-building manner. He testified that their relationship was "give and take." Conrad indicated that if there were strident disagreements between McEnany and Conrad, Conrad would have the ultimate say.

31. After McEnany submitted the letter to Probation and received a copy of Probation's draft

Report, he recalled likely providing Conrad with a copy, and possibly discussing the "bottom line" with Conrad. McEnany recalled, however, that after receiving the Probation Report draft, he had more discussions with Yaffe about it than with Conrad.

32. In comparing the government's position on Hsia's sentencing to other Campaign Finance Task Force cases, this is the first case the attorneys recall in which an upward adjustment on a dollar for dollar basis has been argued. Conrad testified that upward departures have been argued for in several cases, but the way in which the departure is measured in Hsia's case is "different." Conrad did not recall another case in which the government argued for the use of the Fraud table by analogy, and the dollar for dollar departure, even in cases where the dollar amount was significantly higher.

ANALYSIS

In Kastigar v. United States, 406 U.S. 441 (1972), the Supreme Court held that the "use immunity" created by 18 U.S.C.A.§ 6002 (2000) was co-extensive with the Fifth Amendment protection against self incrimination, provided no use was made by the government of the immunized testimony. Kastigar, 406 U.S. at 453. Kastigar dealt with the actual receipt into evidence of the immunized testimony against the defendant or the development of investigative leads from its use. To insure that the immunity granted is in fact co-extensive with the constitutional protection against self-incrimination, Kastigar imposes upon the government the heavy burden of establishing by a preponderance of evidence a source independent of the defendant's immunized testimony for all of its evidence against that defendant.

No one is suggesting in this case, however, that Hsia's Fifth Amendment rights were violated in this sense of direct use of her immunized testimony by her grand jury appearance to be now followed by her sentencing. While the government attorneys, except for O'Brien, have not read the transcript of her grand jury appearance in California, I have. She produced no documents for the grand jury's examination, and, to be blunt, said very little indeed about the topics O'Brien raised when he interrogated her. Thus, Hsia does not and cannot claim that the evidence upon which the government relies for its claims of relevant conduct, which it asserts should be considered at sentencing, came from her own mouth. Hsia has to concede that the government's securing of that evidence antedates her grand jury appearance.

The argument Hsia makes is more complicated and subtle. She insists that the arguments made by the government at sentencing are a product of her grand jury appearance in the sense that the government was motivated to make those arguments because of its perception that she was insincerely asserting language difficulties and thereby evading her obligation to testify truthfully under the immunity order. According to her, the harshness of the government's views as to an appropriate sentence for her are a product of her immunized testimony, a use as prohibited by Kastigar as tendering her grand jury testimony to the sentencing court.

In United States v. North, 910 F.2d 843, 856-59 (D.C. Cir. 1990), the Court of Appeals explained the diametrically opposed views of the courts and commentators as to whether non-evidentiary use of immunized testimony fell within Kastigar's ban on any use of such testimony. While it found that it was unnecessary to resolve that question, it dissociated itself from those courts which had held that non-evidentiary use of immunized testimony could never be use under Kastigar; the Court of

Appeals found those decisions "troubling." Id. at 859-60. Thus, whatever may be the law in other Circuits, any government argument that the formation of Conrad's motivation could not be possible use under Kastigar has absolutely no precedent to support it; North points in the direction of viewing the question of "use" on a case by case basis.

If there is no precedential impediment to finding the formation of Conrad's motivation to be use, then one begins the Kastigar analysis with a determination of whether the government met its burden of showing an independent source for that motivation. If there was an independent source, then perhaps the question of whether the formation of that motivation was use could be avoided. It cannot, however. The only evidence proffered by Conrad in support of his assertion that O'Brien's telling Conrad that O'Brien thought Hsia insincere in her claim of having difficulties understanding O'Brien's question because of Hsia's language difficulties is Conrad's testimony at the hearing that it did not affect the way in which Conrad approached her sentencing. But, the courts have universally held that the government's protestation that the immunized testimony did not affect its prosecution of the immunized witness to be insufficient, no matter how sincere. United States v. Hampton, 775 F.2d 1479, 1485 (11th Cir. 1985) ("[M]ere denials of use by the prosecutors and other government agents are generally insufficient to meet the government's burden, even if made in good faith."). Accord United States v. Byrd, 765 F.2d 1524, 1528 (11th Cir. 1985); United States v. Seiffert, 463 F.2d 1089, 1092 (5th Cir. 1972); United States v. Nemes, 555 F.2d 51, 55 (2d Cir. 1977). As North itself holds, the government must point to evidence which establishes the independent basis for the use of the immunized testimony which is claimed to have been tainted by that testimony. North, 901 F.2d at 872. Here there is none, other than Conrad's protestation of no taint.

More to the point, as Hsia cogently points out, the circumstantial evidence suggests the precise contrary. First, O'Brien's telling Conrad that Hsia was pretending not to understand his questions is a serious allegation. The two men discussed the remedy of contempt proceedings. Any reasonable prosecutor would view such a pretense as an attempt to cover up what one knew, and such a prosecutor would understandably feel that a person who resorts to such tactics should feel the lash of the law at sentencing. Second, one of the most significant moments in Conrad's investigation had to be his interview of the Vice President. The first question Conrad asked the Vice President about Hsia was whether the Vice President believed that Hsia could understand and speak English. Third, when Conrad recruited Yaffe to return to the Task Force, Conrad emphasized the necessity of the government's seeking an upward departure in Hsia's sentence and whether the Guidelines took into account the nature of the loss truly suffered in the government's view. Fourth, while comparisons are odious, it is nevertheless true that Conrad, McEnany and Yaffe could not recall any other case subject to their jurisdiction in which the government asserted that the fraud table should be used to assess the loss amount so that the amount lost for Guidelines purpose equaled dollar for dollar the amount of the contributions illegally made. Conrad indicated that this was true even though other cases involved greater contributions than the ones in Hsia's case.

The most objective view of this evidence is that, at the barest minimum, the evidence that Conrad was not motivated by Hsia's grand jury appearance to seek a harsher sentence is in equipoise with the evidence that he was. When the evidence is in equipoise, the party with the burden of proof

has failed to carry it.[1] Since the government failed to carry its burden of proof, I must conclude that Kastigar bars the use claimed, assuming for the moment that Conrad's motivation is use.

Since this use question cannot be avoided, I believe that it should be resolved in Hsia's favor. I begin by first indicating that the evidence before me permits me only to conclude that Conrad's only affirmative addition to the government's sentencing position was his argument that Application Note 11 to U.S.S.G. § 2F1.1 permitted the use of the table in that Guideline to ascertain the loss amount to be used in sentencing Hsia. The evidence before me convinces me that the government would have made all the other sentencing arguments whether or not Conrad had or had not supervised the preparation of the letter to Probation of November 8, 2000. I therefore would limit the remedy to the suppression of Conrad's addition because I am of the view that the government would have made the other arguments whether Hsia testified or not. To grant Hsia any greater remedy would be to improve her sentencing position merely because she testified in the grand jury. An immunized witness is entitled to be in substantially the same position she would have been had she not testified. Kastigar, 406 U.S. at 462. She is not entitled to be in a better position by testifying than she would have been had she not testified. See United States v. Appelbaum, 445 U.S. 115, 127 (1980).

The narrowness of the remedy being imposed then compels the conclusion that it should be imposed even though it is suppressing a non-evidentiary use of Hsia's testimony. The only arguments made against suppressing non-evidentiary use of immunized testimony is that doing so grants the witness the very transactional immunity Congress eliminated when it enacted 18 U.S.C.A.§ 6002 (2000). See,

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[1]Bar Association of the District of Columbia, Standardized Civil Jury Instruction, No. 2.8 (1998).

e.g., United States v. Serrano, 870 F.2d 1, 17 (1st Cir. 1989); United States v. Mariani, 851 F.2d 595, 600 (2d Cir. 1988); Byrd, 765 F.2d at 1530. It is also said that, if non-evidentiary use is prohibited, there is a risk that the immunized witness's position might be better rather than the same as her position had she not testified, and Kastigar requires only that her position be substantially the same. Serrano, 870 F.2d at 17; Gary S. Humble, Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment, 66 Tex. L. Rev. 351, 379-382 (1987).

These concerns have nothing to do with the suppression I am ordering. First, Hsia is hardly being granted transactional immunity. She still faces sentencing and the necessity of meeting all the government's sentencing arguments except the one I am suppressing. Second, she is in precisely the same position she would have been had Conrad not made the addition he did. On the other hand, it is fatuous to say that Hsia's situation would be the same even if Conrad's addition was left in. She is after all facing an increase of seven levels in her offense level calculation if that addition is not suppressed.

Since there is no logical or legal impediment to doing so, the non-evidentiary use of her immunized testimony should be suppressed. Kastigar prohibits the use of immunized testimony in the broadest possible terms. Kastigar, 406 U.S at 453 (prosecution prohibited from using the compelled testimony in any respect; Fifth Amendment insures that immunized testimony cannot lead to the infliction of criminal penalties on the witness). There is nothing in that decision or its progeny that permits an artificial distinction between non-evidentiary and evidentiary use that could relieve a court of Kastigar's unequivocal command.

Finally, the desirability of avoiding another situation like this one in the future provides additional powerful motivation for this conclusion. The most maddening aspect of this case is how

avoidable the problem was. The cases themselves speak of provisions in the United States Attorney's Manual which indicate that the Attorney General must approve the subsequent prosecution of a immunized witness and may withhold consent unless convinced that the prosecution team has not made diligent efforts to eliminate any possibility of the prosecution being tainted by that witness's immunized testimony. United States v. Semkiw, 712 F.2d 891, 894-95 (3d Cir. 1983). Among the devices suggested to avoid taint are assigning the prosecution to entirely different prosecutors than those who interrogated the witness in the grand jury or had any exposure to the witness's testimony. Id. at 894.

It was one of the prosecutors in this case who spoke to Conrad of wearing a belt and suspenders and suggested the creation of an "ethical wall." The evidence before me convinced me that the prosecution of this case was entrusted to particularly experienced, skilled, and diligent prosecutors. Surely, the notion of an impregnable "Chinese wall" between the prosecutors handling the sentencing and those handling the grand jury appearance could not have been an alien concept. In fact, the only loss the government would have sustained by Conrad having absolutely no contact with O'Brien is that Conrad would not have supervised O'Brien's presentation of Hsia to the grand jury. But, Conrad could have had someone else supervise that one appearance by a witness. Even if O'Brien was not supervised in that one task, he was a skilled and experienced prosecutor and surely could have been entrusted with taking the proper action when she testified. The net loss to the government of creating a "Chinese wall" between O'Brien and Conrad was nugatory, if it was a loss at all.

On the other hand, the failure to erect that wall made necessary the inquiry into the prosecutor's motivation which was awkward and difficult particularly to a court which readily acknowledges the necessity of the Executive Branch functioning independently in exercising the prosecution function. The

desirability of avoiding any similar inquiry in the future when doing so could have been so easily avoided provides additional and powerful stimulus to the conclusion I reach.

I therefore recommend that the government be precluded from making the argument advanced in paragraph "d." of its letter to the Probation Office on November 8, 2000, to wit:

> **d. Departures**...
> Application Note 11 to §2F1.1 provides that "[i]n cases in which the loss determined under subsection (b)(1) does not full [sic] capture the harmfulness and seriousness of the conduct, an upward departure may be warranted." The Government submits that this is such a case, and that the upward departure
> should be based on equivalence of the total amount of illegal conduct payments to the loss table in §2F1.1. A loss equivalent of $139,500 would result in an upward departure of **7**, for a total offense level of **20**.

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JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Dated: